

Pursuant to Ind.Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the
case.

ATTORNEY FOR APPELLANT:

AMY K. NOE
Allen Wellman NcNew
Richmond, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RODNEY L. BAKER,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 89A04-0605-CR-273
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE WAYNE CIRCUIT COURT
The Honorable David A. Kolger, Judge
Cause No. 89C01-0602-FC-007

March 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Rodney L. Baker appeals his conviction for burglary as a class C felony¹ and his status as an habitual offender.² Baker raises two issues, which we restate as:

- I. Whether the trial court erred by denying Baker's motion to exclude certain evidence due to the State's discovery violations; and
- II. Whether the evidence is sufficient to sustain his conviction for burglary as a class C felony.

We affirm.

The relevant facts follow. On February 9, 2006, Kenneth Neal Baker ("Neal") arrived home and parked his car in his garage. Neal saw his air compressor, battery charger, and a crate of comic books in the garage. Neal locked the doors to the garage and closed the garage door.

At approximately 1:15 a.m. on February 10, 2006, Cambridge City Police Officers Larry Kuhn and Chad Sherwood saw a vehicle drive down the alley behind Neal's house. The officers drove down the alley and saw Baker and his girlfriend, Angela Collins, loading an air compressor into the back of the vehicle. Baker was wearing black gloves and had a two-way radio. The officers found the other radio in the vehicle. The officers also saw a crate of comic books next to the vehicle and a battery charger nearby. Although Baker said that he found the air compressor in a nearby dumpster, the officers noticed that the snow on the dumpster had not been disturbed. The officers saw that the side door to Neal's garage was open and that footprints and tracks consistent with the air

¹ Ind. Code § 35-43-2-1 (2004).

² Ind. Code § 35-50-2-8 (Supp. 2005).

compressor were leading from the door. The officers woke Neal, who saw that his air compressor, battery charger, and a crate of comic books were missing. Neal also noticed that a garage window had been opened. Neal identified the items in the alley as belonging to him. Neal later noticed pry marks near the opened garage window and the door.

The State charged Baker with burglary as a class C felony, theft as a class D felony,³ and being an habitual offender. On March 7, 2006, the State filed its notice of discovery compliance. On March 31, 2006, the State filed its final witness and exhibit list. On April 6, 2006, Baker filed a motion to exclude evidence, alleging that photographs, gloves, and two-way radios should be excluded because the items were not disclosed in the State's response to Baker's request for discovery. The trial court denied the motion.

On April 11, 2006, Baker's jury trial began. The trial court admitted photographs, black gloves, and two-way radios over Baker's objection. The jury found Baker guilty of burglary as a class C felony and theft as a class D felony. Baker admitted to being an habitual offender. At sentencing, the trial court sentenced Baker to six years in the Indiana Department of Correction for the burglary conviction enhanced by eight years for his status as an habitual offender.

I.

³ Ind. Code § 35-43-4-2 (2004).

The first issue is whether the trial court erred by denying Baker's motion to exclude certain evidence due to the State's discovery violations. The Indiana Supreme Court has held:

A trial judge has the responsibility to direct the trial in a manner that facilitates the ascertainment of truth, ensures fairness, and obtains economy of time and effort commensurate with the rights of society and the criminal defendant. Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated. Where remedial measures are warranted, a continuance is usually the proper remedy, but exclusion of evidence may be appropriate where the discovery non-compliance has been flagrant and deliberate, or so misleading or in such bad faith as to impair the right of fair trial. The trial court must be given wide discretionary latitude in discovery matters since it has the duty to promote the discovery of truth and to guide and control the proceedings, and will be granted deference in assessing what constitutes substantial compliance with discovery orders. Absent clear error and resulting prejudice, the trial court's determinations as to violations and sanctions should not be overturned.

Fosha v. State, 747 N.E.2d 549, 553-554 (Ind. 2001) (quoting Cliver v. State, 666 N.E.2d 59, 64 (Ind. 1996), reh'g denied).

Here, the State does not dispute that it failed to disclose photographs, gloves, and two-way radios in its initial discovery response. Baker first learned of the existence of these items twelve days before trial in the State's final witness and exhibit list. Baker filed a motion to exclude the evidence but did not request a continuance. "[A]s a general proposition, the proper remedy for a discovery violation is a continuance." Warren v. State, 725 N.E.2d 828, 832 (Ind. 2000). "Failure to alternatively request a continuance upon moving to exclude evidence, where a continuance may be an appropriate remedy,

constitutes a waiver of any alleged error pertaining to noncompliance with the court's discovery order." Id. Baker did not request a continuance, and consequently, this issue is waived. See, e.g., id.

Waiver notwithstanding, Baker's argument still fails. "The exclusion of evidence as a remedy for a discovery violation is only proper where there is a showing that the State's actions were deliberate or otherwise reprehensible, and this conduct prevented the defendant from receiving a fair trial." Id. In this case, Baker has not demonstrated that the State's action was deliberate or otherwise reprehensible. Additionally, Baker has not demonstrated that he was prevented from receiving a fair trial. Baker reviewed the evidence prior to his trial, and a significant amount of other evidence was presented against him. We conclude that the trial court did not err by denying Baker's motion to exclude the evidence as a sanction for the State's discovery violation. See, e.g., id. (holding that the trial court did not err when it failed to exclude evidence as a sanction for a discovery violation).

II.

The next issue is whether the evidence is sufficient to sustain Baker's conviction for burglary as a class C felony. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the

conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

It is well established that “circumstantial evidence will be deemed sufficient if inferences may reasonably be drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt.” Brink v. State, 837 N.E.2d 192, 194 (Ind. Ct. App. 2005), trans. denied. Mere presence at the crime scene with the opportunity to commit a crime is not a sufficient basis on which to support a conviction. Id. However, presence at the scene in connection with other circumstances tending to show participation, such as companionship with the one engaged in the crime, and the course of conduct of the defendant before, during, and after the offense, may raise a reasonable inference of guilt. Id.; Maul v. State, 731 N.E.2d 438, 439 (Ind. 2000).

The offense of burglary as a class C felony is governed by Ind. Code § 35-43-2-1, which provides that “[a] person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class C felony.” The State was required to prove beyond a reasonable doubt that Baker did break and enter Neal’s garage with the intent to commit theft.

Baker argues that, although he was in possession of the stolen items, the evidence was insufficient to show that he entered Neal’s garage. We must disagree. The evidence demonstrated that the officers discovered Baker and his girlfriend attempting to load a compressor into their vehicle at approximately 1:15 a.m. in the alley behind Neal’s garage. The officers also found a crate of comic books and a battery charger. A side

door to Neal's garage was open and tracks leading from the door were consistent with the air compressor. Neal identified the air compressor, crate, and battery charger as belonging to him, and a window to his garage had been pried open. At the time, Baker was wearing black gloves and had a two-way radio. Although Baker said that he found the air compressor in a nearby dumpster, the officers noticed that the snow on the dumpster had not been disturbed.

The evidence showed that someone had broken into Neal's garage, Baker was in the alley behind Neal's garage, Baker was in possession of the stolen items, and Baker's excuse for having the stolen items was not credible. We conclude that evidence of probative value exists from which the jury could have found Baker guilty beyond a reasonable doubt of burglary as a class C felony. See, e.g., Brink, 837 N.E.2d at 198 (holding that the evidence was sufficient to sustain the defendant's conviction for burglary as a class C felony).

For the foregoing reasons, we affirm Baker's convictions for burglary as a class C felony.

Affirmed.

SULLIVAN, J. and CRONE, J. concur